

SOMEDAY THEY'LL HAVE A WAR AND NOBODY WILL COME

by Staughton Lynd

There is a contradiction in U.S. law concerning conscientious objection. The Nuremburg Tribunal was premised on the concept that an individual must refuse to commit war crimes in a particular war. High-ranking German and Japanese personnel who were found to have violated this mandate were executed. The Nuremburg concept has been incorporated in the United States Army's manual. Yet, the law of conscientious objection still requires a member of the military to object to service in all wars, that is, to be a pacifist, in order to qualify for conscientious objection. This must be changed.

I must begin with a scholarly correction. The title of this talk, "Someday They'll Have a War And Nobody Will Come," is one of those quotations that has been in your head forever and that you are sure is right. However, it is wrong. The correct quotation—which I consider less felicitous—turns out to be "Sometime they'll give a war and nobody will come." Moreover, I was quite certain that the quotation came from a play by Irwin Shaw called "Bury The Dead." That is wrong also. The quotation is from Carl Sandburg's "The People, Yes."

Both "Bury The Dead" and "The People, Yes" were published in 1936. Thus, neither was a product of the period between September 1939, when Germany invaded Poland, and June 1941, when Germany invaded the Soviet Union, the period that Communist Parties termed the period of "phony war" and during which persons in and close to the Party strenuously opposed war preparations. Indeed, in 1936, the Communist Party was encouraging young men to go to Spain to fight

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in the International Brigades. Accordingly, I presume that the passionate antiwar sentiments of these two literary works expressed what we might call the "World War I syndrome." In some liberal and radical circles in 1936, there was still a wide and deep opposition to war caused by the horrors of 1914–1918.

David Dellinger, in whose memory I delivered the original version of this talk, was one of a very small number of persons whose pacifism continued into and throughout World War II. David was one of the Union Theological Seminary Eight who not only refused to fight in the Second World War but refused to register for the draft. David served two terms in federal prison and helped to lead long hunger strikes protesting racial segregation, censorship of mail, and other objectionable prison practices.

While David was doing his second prison term for war resistance, his wife Betty was pregnant. David tells in *From Yale to Jail* how when he was on hunger strike at Lewisburg the warden came to his cell and said, "She's dying. She has sent a message telling you to go off the strike so she can die in peace." David said, "Take me to her." The warden refused and David concluded, correctly, that the warden was lying. The prisoners won one of the major goals of their hunger strike concerning the censorship of mail. David was given a pile of letters from Betty telling him that she was well and supported the strike. The Dellingers' oldest child, Patchen, was born soon after.

When the Union Eight were released from prison, Union offered them readmission on condition that they would avoid any course of action that would publicize their draft resistance. Five of the eight refused and went instead to Chicago Theological Seminary.

Another opponent of the military Goliath, David Mitchell, pioneered in the 1960s the position that I wish to explicate tonight. David Mitchell said that he was not a pacifist. He refused to participate in the Selective Service process because he believed that the actions of the United States in Vietnam were war crimes, as war crimes had been defined at Nuremberg after World War II. He spent two years in prison.

With these forerunners in mind, we turn to the message of another hero, Ehren Watada. In the military, justice is administered by court-martial. In the court-martial process, there is a proceeding similar to the convening of a grand jury. It is called an Article 32 hearing. The hearing officer decides whether there is sufficient evidence to justify a court-martial. On August 17, 2006, at Fort Lewis, Washington, there was an Article 32 hearing for Lt. Watada. Early in the hearing,

the prosecution played video clips from his recent speeches. In one of these speeches at the national convention of Veterans for Peace, Lt. Watada said, "Today, I speak with you about a radical idea The idea is this; that to stop an illegal and unjust war, the soldiers...can choose to stop fighting it." Of course, in itself this was not a new idea. It was another way of saying, someday they'll have a war and nobody will come.

But what is unusual is Lt. Watada's basis for saying "No." Like David Mitchell in the 1960s, Ehren Watada is not a pacifist. He offered to go to Afghanistan but refused to go to Iraq. He refused to go to Iraq for the same reason David Mitchell refused to go to Vietnam, not because of objection to all wars, but because of a conviction that war crimes were being committed in this particular war, giving rise to an obligation, under the principles declared at Nuremburg, to refuse military service.

Carl Mirra has edited a collection of oral histories of the second Iraq War entitled *Soldiers and Citizens: An Oral History of Operation Iraqi Freedom from the Battlefield to the Pentagon*. Therein, two interviewees—one a veteran and the other a veteran's wife who now does military counseling—express the view that the current legal definition of conscientious objection is too confining, too "tight." It is confining and tight because it requires a soldier who is troubled by actions he has been ordered to commit to object to participation in all wars in order to refuse conscientiously. Self-evidently, conscience cannot be thus circumscribed, and Nuremburg did not intend that it should be. A soldier can and must be able to say "No" to orders in a particular war that he perceives to be war crimes and that deeply offend conscience.

Take a minute to recognize how radical a change this would be. The concept of conscientious objection, as set forth in Selective Service law during and after World War II and in the existing regulations of all the military services, is based on the Christian teaching of forgiveness of enemies, of doing good for evil, of turning the other cheek, of putting up the sword. To become a conscientious objector, the applicant must object to participation in "war in any form," which is to say, to *all* wars.

This is a noble idea. I happen to adhere to it, personally. But it is unlikely ever to be the conviction of more than a very few persons of military age. It is a legal system written to accommodate the tender consciences of members of certain small Christian sects that came

into being during the Radical Reformation: Hutterites, Quakers, Amish, Mennonites, Brethren, and the like. And let us be honest, *Conscientious Objection thus defined exists because the powers that be know that it will never be the world view of more than a handful of persons.*

Moreover, it should be obvious that in a volunteer military, an even tinier minority of service men and women can be expected to object to war in any form. Had this been their belief, why would they have volunteered in the first place? In fact, it is possible to become a conscientious objector while serving in the military. Certain remarkable individuals like Camillo Mejia and Kevin Benderman have deployed to Iraq, been horrified by what they experienced, and on reflection concluded that they will never again fight in any war. But common sense tells us that such Conscientious-Objectors-From-Experience-In-A-Particular-War will be few. This is especially so because, as was the case with both Mejia and Benderman, the military will court-martial and imprison such objectors without giving them the legally required opportunity to appeal an initial rejection of conscientious objector status.

The system can tolerate traditional conscientious objectors. For those who remember Herbert Marcuse's concept of "repressive tolerance," this is an example: precisely by making room for such atypical refuseniks, the system as a whole can continue undisturbed.

But it might be otherwise if the David Mitchell-Ehren Watada approach became law. Then, you might have hundreds, even thousands of soldiers saying, in effect: "I can't tell you how I might feel in another war. But I can tell you where I stand about this one. This particular war is a war that requires the commission of war crimes. It may even be a war that as defined at Nuremburg is a war crime in its totality, because it is an aggressive war, a crime against the peace. I ain't gonna study this war no more." If that idea were once let loose in the land, one might indeed have a war to which very few would come. So, let us try to form a more precise idea of refusal to fight based on the belief that a particular war involves war crimes.

THE NUREMBURG PRINCIPLES

At the end of the Second World War, humanity imagined a new design of international relations. In that new web of relationships, all nations would recognize certain human rights, all persons and governments would be required to avoid certain war crimes and crimes

against humanity, all conquering states would commit themselves to prescribed behavior with respect to prisoners and occupied territories.

The initial conceptualization of these new rights and obligations took place at Nuremburg. For more than a half century, the verdicts at Nuremberg in trials of German leaders after World War II have provided the fundamental standards by which alleged war crimes are to be assessed. The Charter of the International Military Tribunal (IMT) identified three kinds of war crimes:

1. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
2. Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds, in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.
3. Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.¹

Apart from the definition of war crimes, three principles set forth in the Charter are of particular importance here.

The first is that the defense of "superior orders"² is expressly rejected. Article 8 of the Charter specified: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."³

The second Nuremburg principle is that international law must take precedence over the law of any particular nation. Expansion and clarification of the Nuremburg Principles was carried forward by the U.N. International Law Commission in 1950, when it adopted and

codified them in broad application to international law, drawing in some cases on the judgments of the Tribunal.

Here, the Commission highlighted at the outset the principle "that international law may impose duties on individuals directly without any interposition of internal law" and, as a corollary, that individuals are not relieved of responsibility under international law "by the fact that their acts are not held to be crimes under the law of any particular country." The Commission went on to point out that this implies "what is commonly called the 'supremacy' of international law over national law" and to cite the declaration of the IMT that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."⁴

The third, and for my purposes most important, Nuremberg principle is that aggressive war is a crime no matter what nation may commit it. The nations that framed the Charter, the judges of the Tribunal, and in particular, the representatives of the United States considered that henceforth the crimes defined at Nuremberg should apply to all nations, including those that conducted the trials. Among these crimes was the "crime against peace" of aggressive war.

Robert Jackson, Associate Justice of the United States Supreme Court and Chief Counsel for the United States during the Nuremberg proceedings, reported that the definition of aggressive war occasioned "the most serious disagreement" at the conference which drafted the Charter. Jackson stated that the United States "declined to recede from its position even if it meant the failure of the Conference." He described the conflict as follows:

The Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when committed by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct.⁵

Telford Taylor corroborates Jackson's account. According to Taylor, "the definition of the crimes to be charged... was an important question of principle which at first appeared to be intractable." The Soviets, Taylor says, wanted to charge the Nazi leaders with

"[a]ggression against or domination over other nations *carried out by the European Axis*." The Soviets were willing to define "war crimes" and "crimes against humanity" as violations of international law no matter by whom committed. But the Russians—and the French—resisted creating a new crime of aggressive war.⁶

At the final meeting of the London conference, the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all. In his opening statement to the Tribunal, Justice Jackson articulated the consensus reached by the United States, France, Great Britain, and the Soviet Union. "[L]et me make clear that while this law is first applied 'against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.'" ⁷ Telford Taylor quoted this solemn affirmation by Justice Jackson on the first page of his subsequent book on Nuremberg and Vietnam.⁸

In trials conducted by the victorious occupying nations in other courts in occupied territory, phraseology limiting the jurisdiction of the tribunals to persons "acting in the interests of the European Axis countries" was dropped, making way for expansion of the Nuremberg Principles beyond the immediate prosecution of agents of the defeated European powers. As Taylor wrote, "Nuremberg is a historical and moral fact with which, from now on, every government must reckon in its internal and external policies alike." Recalling the declaration of the Tribunal regarding the impartial application of its principles to all, Taylor wrote: "We may not, in justice, apply to these defendants because they are Germans, standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations."⁹ And on the last page of his book on Nuremberg, published shortly before his death, Taylor once again affirmed what he obviously considered to be the heart of the Nuremberg proceedings. Reflecting on the growing demand in the 1990s for the establishment of a permanent tribunal for the trial of international crimes, Taylor recalled:

that the Nuremberg Tribunal had jurisdiction only over "the major war criminals of the European Axis countries." Considering the times and circumstances of its creation, it is hardly surprising that the Tribunal was given jurisdiction over the vanquished but not the victors. Many times I have heard Germans (and others) complain that "only the losers get tried."

Taylor continued:

Early in the Korean War, when General Douglas MacArthur's forces landed at Inchon, the American and South Korean armies drove the Koreans all the way north to the border between North Korea and China, at the Yalu River. About a week later the Chinese attacked in force and their opponents were driven deep into South Korea.

During the brief period when our final victory appeared in hand, I received several telephone calls from members of the press asking whether the United States would try suspect North Koreans as war criminals. I was quite unable to predict whether or not such trials would be undertaken, but I replied that if they were to take place, the tribunal should be established on a neutral base, preferably by the United Nations, and given jurisdiction to hear charges not only against North Koreans but South Koreans and Americans (or any other participants) as well.

And Taylor concluded: "I am still of that opinion. The laws of war do not apply only to the suspected criminals of vanquished nations. There is no more or legal basis for immunizing victorious nations from scrutiny. The laws of war are not a one-way street."¹⁰

It is crystal clear, then, that after the Nuremberg trials, the United States was committed to having its own conduct judged according to the principles of international law applied in those proceedings.

THE NUREMBERG PRECEDENT IN U.S. COURTS AND MILITARY TRIBUNALS

During and after the Vietnam War, U.S. courts and military tribunals were asked to apply the Nuremberg Principles to the conduct of individual soldiers. The civilian judicial system washed its hands of the issue and (to use another Biblical metaphor) passed by on the other side. Military tribunals were far more forthright than their civilian counterparts in facing the problem but did not succeed in resolving the dilemma.

David Mitchell and the Fort Hood Three

When David Mitchell was found guilty by the trial court and the federal court of appeals, his attorneys sought a writ of certiorari from

the United States Supreme Court. The Supreme Court of the United States decided not to consider the case. Justice William Douglas dissented from the denial of certiorari. He stated in part that petitioner's

defense was that the "war" in Vietnam was being conducted in violation of various treaties to which we were a signatory, especially the Treaty of London of August 8, 1945, 59 Stat. 1544, which in Article 6(a) declares that "waging of a war of aggression" is a "crime against peace," imposing "individual responsibility." Article 8 provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment"

Mr. Justice Jackson, the U.S. prosecutor at Nuremberg, stated: "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." (International Conference on Military Trials, Dept. State Pub. No. 3880, p. 330.)

Article VI, cl. 2, of the Constitution states that "treaties" are a part of "the supreme law of the land; and the Judges in every State shall be bound thereby."

There is a considerable body of opinion that our actions in Vietnam constitute the waging of an aggressive "war."

This case presents the questions:

- (1) whether the Treaty of London is a treaty within the meaning of Article VI, cl. 2;
- (2) whether the question of the waging of an aggressive "war" is in the context of this criminal prosecution a justiciable question;
- (3) whether the Vietnam episode is a "war" in the sense of the Treaty;
- (4) whether petitioner has standing to raise the question;
- (5) whether, if he has, it may be tendered as a defense in this criminal case or in amelioration of the punishment.

These are extremely sensitive and delicate questions. But they should, I think, be answered.¹¹

In *Mora et al. v. McNamara et al.*, three young men already drafted into military service—Dennis Mora, James Johnson, and David

Samas—refused to deploy to Vietnam. They offered essentially the same defense as had David Mitchell, adding the provisions of the U.S. Army Field Manual, *The Law of Land Warfare* (FM 27-10, 1956). This time, two justices of the United States Supreme Court, Justices Douglas and Potter Stewart, dissented from denial of certiorari.¹²

Howard Levy

Captain Howard B. Levy, M.D., also a draftee, refused to teach medicine to Green Beret soldiers at Fort Jackson, South Carolina.

The hearing officer at Capt. Levy's court-martial, Colonel Earl Brown, the law officer, suddenly injected the possibility of a defense based on Nuremberg:

Now the defense has intimated that special forces aidmen are being used in Vietnam in a way contrary to medical ethics. My research on the subject discloses that perhaps the Nuremberg Trials and the various post-war treaties of the United States have evolved a rule that a soldier must disobey an order demanding that he commit war crimes, or genocide, or something to that nature. However, I have heard no evidence that even remotely suggests that the special forces of the United States Army have been trained to commit war crimes, and until I do, I must reject this defense.¹³

In colloquy with the prosecutor that followed, Colonel Brown stated that if the aidmen were being "trained to commit war crimes, then I think a doctor would be morally bound to refuse" to train them.¹⁴

Counsel for Dr. Levy were given one extra day to assemble witnesses to put on a Nuremberg defense. The defense found three witnesses. Donald Duncan was a former Special Forces Sergeant, who became disaffected while serving in Vietnam and resigned from the Army. Robin Moore was the author of a best-selling book, *The Green Berets*. Captain Peter Bourne was an Army psychiatrist who had served in Vietnam. The defense also proffered as exhibits four thousand articles describing war crimes in Vietnam, including war crimes by the Special Forces, and a brief by Professor Richard Falk, an international law expert at Princeton, assisted by Richard Barnet of the Institute for Policy Studies. Finally, the defense submitted a list of thirty-eight witnesses to be called should Col. Brown determine that a prima facie case of Nuremberg violations had been made out.¹⁵

An out-of-court hearing followed. *The Law of Land Warfare* prohibits assassination of enemy soldiers or civilians. Duncan and Moore described assassination by U.S. forces and by the Vietnamese personnel that they trained. *The Law of Land Warfare* prohibits "putting a price on an enemy's head," but Duncan and Moore testified that in Vietnam it was a common practice. Most riveting, it seems, was defense testimony about torture and murder of unarmed prisoners, although *The Law of Land Warfare* prohibits killing prisoners "even in the case of...commando operations."¹⁶ Assessing the Nuremberg defense presented by Dr. Levy's counsel, Col. Brown simply ruled that Levy had failed to make a prima facie showing.¹⁷

Levy, like Mitchell and Mora before him, sought review by the Supreme Court of the United States. In *Parker v. Levy*, 417 U.S. 733 (1974), the Supreme Court upheld the validity of Levy's court-martial conviction. Military tribunals quote and rely on the high court's pronouncement in *Parker v. Levy* that "the military is, by necessity, a specialized society," and hence "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."¹⁸ Justice Stewart angrily read his dissenting opinion from the bench.

After Vietnam

The evasion of Nuremberg by the United States Supreme Court in the Mitchell, Mora, and Levy cases continues to cast a long shadow.

Further departing from the Nuremberg principles, the United States has now explicitly endorsed the doctrine of preemptive war. In a speech at the 2002 graduation exercises at West Point, President George W. Bush remarked that for much of the last century, America's defenses had relied on the Cold War doctrines of deterrence and containment. But, the President argued, containment means nothing against "terrorist networks with no nation or citizens to defend," "the war with terror will not be won on the defensive," and the United States must be prepared for "preemptive action when necessary."¹⁹ In September 2002, the Bush Administration promulgated a new National Security Doctrine which stated, in part, that "we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."²⁰

This new doctrine would appear expressly to violate the condemnation of aggressive war on which the United States insisted at Nuremberg. A conviction that his country is an aggressor in violation of international law is the essence of Lt. Watada's conclusion that what he is being ordered to do is unlawful. *He considers that he is not engaging in "civil disobedience" but rather obeying settled international law that Nuremberg decreed he would disregard at his peril.* In his case, then, and in future cases like his, a potential or actual soldier may be entitled to refuse orders not only because they require "war crimes" or "crimes against humanity," but also because they demand obedience to a "crime against peace": aggressive war.

CONCLUSION

To conclude: The little girl quoted in *The People, Yes* deserves the last word:

The little girl saw her first troop parade and asked, "What are those?"

"Soldiers."

"What are soldiers?"

"They are for war. They fight and each tries to kill as many of the other side as he can."

The girl held still and studied.

"Do you know ... I know something?"

"Yes, what is it you know?"

"Sometime they'll give a war and nobody will come."²¹

NOTES

1. The Charter was part of the Treaty of London, August 8, 1945 (59 Stat. 1544), which established an International Military Tribunal. *The Nuremberg Case as Presented by Robert H. Jackson, Chief of Counsel for the United States* (New York: Cooper Square Publishers, 1971), 22-23. The first session of the general assembly of the United Nations unanimously affirmed the principles of international law in the Charter and directed the International Law Commission to formulate them into an International Criminal Code. Res. 95 (1), December 11, 1946. The text of the Charter may

be found in Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945–46: A Documentary History* (Boston: Bedford Books, 1997), 51–55.

2. This was later often called the “Eichmann defense,” in reference to the spectacular trial of Adolf Eichmann in Jerusalem in 1961. Eichmann had been head of the Jewish Affairs Section of the Reich Security Head Office and was viewed as one of those chiefly responsible for the attempted “final solution of the Jewish question.” Eichmann’s defense rested in part on the claim that he had acted on superior orders and, moreover, under duress that left him no moral choice. The Israeli court rejected this argument, holding that “the accused closed his ears to the voice of conscience.” The court quoted the judgment of a District Military Court following the IMT that if an order was “manifestly unlawful, it cannot be used as an excuse.” Cited in Robert K. Woetzel, *The Nuremberg Trials in International Law, with a Postlude on the Eichmann Case* (New York: Praeger, 1962), 269. The Court of Appeals in Eichmann’s case further concluded in 1962 that “the appellant had received no ‘superior orders’ at all. He was his own superior, and he gave all orders in matters that concerned Jewish affairs.” Cited in Hannah Arendt, *Eichmann in Jerusalem* (New York: Viking Press, 1963), 227.

3. Marrus, *The Nuremberg War Crimes Trial*, 53. Nevertheless, several of the defendants in the Trial of the Major War Criminals and many defendants in subsequent trials used the argument of superior orders to defend themselves. The Judgments of the International Military Tribunal (IMT) rejected this defense in all cases, generally on the ground that the Charter prohibited it. In some cases, the defense was rejected even for the purpose of mitigating a sentence. For example, in the case of Wilhelm Keitel (Chief of the High Command of the Armed Forces, directly under Hitler), the Tribunal concluded: “There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.”

4. Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the U.N. International Law Commission, August 2, 1950, U.N. Doc. A/1316, 2 Y.B.I.L.C. 374 (1950), Principle I, par. 99; Principle II, par. 100, 102. Article 8 was revised by the International Law Commission to read: “The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.” In this formulation, the provision of Article 8 allowing mitigation of punishment was dropped on the ground that “the question of mitigating punishment is a matter for the competent court to

decide,” rather than a matter of general principle. At the same time, the provision concerning moral choice was added, based upon the following declaration of the judgment:

The provisions of this article ... are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order but whether moral choice was in fact possible. *Id.*, par. 105.

5. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (New York: AMS Press, 1949), vii–viii.

6. Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), 65–66 (emphasis added). Scholarship during the past half century has confirmed the account by Jackson and Taylor. An authoritative article appearing in 2002 states:

The difficulties centered on whether the substantive definition of aggression would specify Nazi or Axis aggression (the Soviet position), or would define the crime [against peace] in a clean, universal way that might, in another era, even include American acts (the Jackson position).... In the end, the Charter for the new tribunal embodied Jackson’s view.

Jonathan A. Bush, “‘The Supreme ... Crime’ and its Origins: The Lost Legislative History of the Crime of Aggressive War,” *Columbia Law Review*, Vol. 102, No. 8 (December 2002): 2369.

7. Opening Statement for the United States, November 21, 1945, *The Nuremberg Case as Presented by Robert H. Jackson Chief of Counsel for the United States* (New York: Cooper Square Publishers, 1971), 93.

8. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam Books, 1971), 11–12. Taylor went on to say:

However history may ultimately assess the wisdom or unwisdom of the war crimes trials, one thing is indisputable: At their conclusion, the U.S. government stood legally, politically, and morally

committed to the principles enunciated in the charters and judgments of the tribunals. [Taylor shows that the President of the United States, thirty or more American judges who took part in the tribunals, General Douglas MacArthur, and the U.S. delegation to the United Nations general assembly all squarely endorsed the Nuremberg principles in one-way or another.]

Thus, the integrity of the nation is staked on those principles, and today the question is how they apply to the conduct of our war in Vietnam and whether the U.S. government is prepared to face the consequences of their application ...

[T]he Son My [My Lai] courts-martial are shaping the question for us, and they cannot be fairly determined without full inquiry into the higher responsibilities. Little as the leaders of the Army seem to realize it, this is the only road to the Army's salvation, for its moral health will not be recovered until its leaders are willing to scrutinize their behavior by the same standard that their revered predecessors applied to Tomayuki Yamashita twenty-five years ago.

Id., pp. 94, 182.

9. Taylor, *Final Report*, 234, 235.

10. Taylor, *Anatomy of the Nuremberg Trials*, 641. The speaker, although a vigorous opponent of the Vietnam War, took a similar position in declining to take part in the War Crimes Tribunal created by Lord Bertrand Russell. See Bush, "The Supreme ... Crime," p. 2393 No. 224, citing Staughton Lynd, "The War Crimes Tribunal: A Dissent," *Liberation*, Vol. 12 (December 1967–January 1968), 76.

11. Douglas, J., dissenting, in *Mitchell v. United States*, 386 U.S. 972 (1967), quoted in *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), ed. Alice Lynd, 102–104.

12. *Id.*, 182–184.

13. Tr. at 875, quoted in Robert N. Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy," 1994 *Wisconsin Law Review* 839, 902.

14. Tr. at 878, quoted in *id.*, 903. According to Professor Strassfeld, Colonel Brown had often discussed the implications of the Nuremberg and

Tokyo war crimes trials as a law instructor at West Point in the late 1940s and had been deeply impressed by the movie *Judgment at Nuremberg*.

15. *Id.*, 905–908.

16. *Id.*, 908–915.

17. *Id.*, 922–923.

18. *United States v. Moore*, 58 M.J. 466, 2003 CAAF LEXIS 694 (2003), quoting *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974).

19. <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (emphasis added).

20. *The National Security Strategy of the United States of America* (Washington D.C.: September 2002), 5 (emphasis added).

21. Carl Sandburg, *The People, Yes* (New York: Harcourt, Brace and Company, 1936), 43.

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